MOTION FILED

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IN THE

70-5045

SUPREME COURT OF THE UNITED STATES

October Term, 1971

Misc. No. ~~6158~~

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated - - - Appellants

versus

DOROTHY M. NORMET,
THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and
ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH - - Appellees

Appeal from U. S. District Court
for the District of Oregon

MOTION OF LEGAL AID SOCIETY OF LOUISVILLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND
BRIEF OF LEGAL AID SOCIETY OF LOUISVILLE AS AMICUS CURIAE

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v.

DOROTHY M. NORMET
THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and
ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH - - - - - *Appellees*

MOTION OF LEGAL AID SOCIETY OF LOUISVILLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Legal Aid Society of Louisville, Kentucky, moves for leave to file the attached brief as *amicus curiae* in this case. The consent of counsel for the named appellants has been obtained. The consent of all of the named appellees or their counsel was requested but refused.

The interest of the Legal Aid Society of Louisville in this case arises from the fact that it regularly counsels and represents an extremely large number of low-

income tenants who are defendants in forcible detainer proceedings brought by landlords against them in the courts within the Commonwealth of Kentucky. The statutory law of the Commonwealth of Kentucky with respect to forcible detainer proceedings, and eviction thereunder, is similar in many respects to the statutory law of the State of Oregon relating thereto. Determination of the issues presented in this case as to the constitutionality of certain Oregon statutes would be applicable with like force and effect to similar Kentucky statutes. The Legal Aid Society of Louisville and its clientele has a common and real concrete interest in the decision in this case.

It is believed that the *amicus* brief that is tendered herewith contains additional arguments on the constitutional issues which, if accepted, would be dispositive of this case.

Respectfully submitted

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July 1, 1971

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

Misc. No. 6158

DONALD and EDNA LINDSEY, et al. - *Appellants*

v.

DOROTHY M. NORMET, et al. - - - *Appellees*

BRIEF OF LEGAL AID SOCIETY OF LOUISVILLE AS AMICUS CURIAE

May it please the Court:

STATEMENT OF AMICUS CURIAE

The Legal Aid Society of Louisville regularly counsels and represents an extremely large number of low-income tenants who are defendants in forcible detainer proceedings brought against them by landlords in courts within the Commonwealth of Kentucky. Because of the similarity between the forcible detainer statutes of Oregon and Kentucky, the decision of this Court in this case will have great impact in Kentucky as well as in Oregon.

The pertinent Oregon statutes are set out in the appellants' Jurisdictional Statement filed herein. Set out below are references to comparable Kentucky statu-

tes, decisions and practices in connection with forcible detainer proceedings and evictions thereunder in Kentucky:

Kentucky Revised Statutes 383.210 provides that the proceeding is begun upon complaint. However complaint may be oral as there are no written pleadings. Vol. 3A *Richardson's Kentucky Practice,* page 631, sec. 974; *Tolbert* v. *Young,* 172 Ky. 269, 189 S. W. 209; *Jolly* v. *Gilbert,* 190 Ky. 1, 226 S. W. 354; *Tinsley* v. *Majorana,* Ky., 240 S. W. 2d 539.

Kentucky Revised Statutes 383.210 provides that the warrant or writ of forcible detainer shall stand for trial upon three days notice. The date of service is counted as the first day.

Kentucky Revised Statutes 454.030 provides that the warrant or writ of forcible detainer may be served upon the defendant by posting a copy on the premises if the officer does not find the defendant or a member of his family over sixteen years of age. In almost fifty percent of the cases, the defendants are without knowledge of the pendency of the proceeding.

Kentucky Revised Statutes 383.210, 383.235 and 383.245 describe the purpose of the trial to be to "inquire" into the matter by "inquest" or "inquisition." But findings of guilty are entered without any inquiry in the vast majority of cases, solely because of failure of the defendant to appear.

Kentucky Revised Statutes 383.235 provides that "jurors" shall say whether the defendant is guilty of forcible detainer unless the jury is waived. Juries are virtually never impaneled in forcible detainer cases.

Kentucky Revised Statutes 383.245 and 383.255 provide for the issuance of a writ of possession three days after a finding of guilty of a forcible detainer if the defendant has not in the meantime filed a traverse and a traverse bond, with surety, to fully secure payment of the amount claimed. Many tenants are set-out on the street before they learn of the pendency of a forcible detainer proceeding. Low-income tenants are usually unable to make the traverse bond even if they knew of the proceeding.

There are no statutes or ordinances in Kentucky providing that tenants may off-set against rent the cost of making repairs to render the leased premises habitable for human occupancy.

ARGUMENT

(1) Tenants Have Property Interests in Leased Premises

When the owner of realty leases same he conveys an interest therein to the lessee, who becomes as much the owner of the right of possession of the leased premises as a grantee in a deed is the owner of the freehold. *Dan Cohen Realty Co.* v. *National Savings and Trust Co.*, 6th Cir., 125 F. 2d 288. A lease divests the owner for a given time of a certain estate in the realty, leaving to the owner a reversion. *Mattingly's Executor* v. *Brents*, 155 Ky. 570, 159 S. W. 1157; *Moore* v. *Brandenburg*, 234 Ky. 400, 28 S. W. 2d 477. In *Pikeville Oil and Tire Co.* v. *Deavors*, Ky., 320 S. W. 2d 782, the Court of Appeals of Kentucky said that "a lease is not only an executory contract, it is also a present conveyance or grant of a slice or an interest less than a fee, with conditions attached."

Although a lessee's interest is purely possessory, it is nonetheless a valuable property right within the meaning and protection of the Fourteenth Amendment of the United States Constitution.

(2) Due Process Requires a Fair Evidentiary Hearing Upon Adequate Notice Before Deprivation of Property.

There is nothing new or revolutionary in the decisions of this Court in *Sniadach* v. *Family Finance Corp.* (1969), 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, and *Goldberg* v. *Kelly* (1970), 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 287. In a long line of earlier cases, many of which are cited in appellants' Jurisdictional Statement, this Court had consistently held that the Fourteenth Amendment of the United States Constitution prohibits the deprivation of property, or a property right or interest, under color of state law, without a prior fair evidentiary hearing upon adequate notice. The *Sniadach* case merely applied those principles to pre-judgment garnishment in judicial proceedings. The *Goldberg* case applied the same principles to the termination of welfare benefits in administrative proceedings, and clearly and unequivocally spelled out the following procedural due process requirements that are applicable to both judicial and administrative proceedings:

(1) Timely and adequate written notice of proposed action.

(2) Meaningful time and place of hearing.

(3) Timely and adequate written notice of time and place of hearing.

(4) Effective opportunity to be present at the hearing and defend the proposed action in person and by counsel.

(5) Effective opportunity to confront and orally cross-examine adverse witnesses and present oral evidence and argument.

(6) Hearing to be conducted by an impartial person.

(7) Decision to be based solely on legal rules and evidence adduced at the hearing.

Subsequently, this Court held invalid a state statute that permitted local officials to forbid the sale of intoxicants to persons who by excessive drinking habits might become exposed to want or be dangerous to the peace, because there was no statutory provision for a fair hearing upon notice prior to such action *Wisconsin* v. *Constantineau,* (January 19, 1971), 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507. And later this Court struck down a state motor vehicle responsibility statute that provided for suspension of a drivers license and motor vehicle registration for failure to post bond after an automobile accident, because no pre-suspension hearing was provided by the statute. *Bell* v. *Burnson, Director Georgia Department of Public Safety* (May 24, 1971), —— U. S. ——, —— L. Ed. 2d ——, 91 S. Ct. 1586, 39 U. S. Law Week 4607. The decisions in both of those cases were based upon the lack of procedural due process guaranteed by the Fourteenth Amendment.

Citing the *Sniadach* and *Goldberg* cases, a three-judge United States District Court in the Eastern Dis-

trict of Pennsylvania held unconstitutional the statutes of the State of Pennsylvania permitting a distress sale of a tenant's property without a prior evidentiary hearing upon reasonable notice. *Santiago, et al.* v. *McElroy, et al.*, 319 F. Supp 284 (1970). In response to the argument that distress sales without hearings were a time-honored procedure, the Court said that "the blessing of age wears out" (at 295) and that the rights of the tenant to maintain a replevin action against his landlord for wrongful distraint does not compensate for the lack of due process in the distress proceeding (at 294). See also *Hall, et al.* v. *Garson, et al.*, 430 F. 2d 430 (5th Cir. 1970), stating that a state statute permitting peremptory distraint by a landlord without a hearing is contrary to the Fourteenth Amendment.

(3) Equal Protection Requires That Tenants Have the Right to Litigate on an Equal Basis With Landlords.

A forcible detainer proceeding is summary and has been described as quasi criminal in nature and in derogation of the common law. 35 American Jurisprudence 2d page 891.

The Oregon forcible detainer statutes, like the Kentucky forcible detainer statutes, and perhaps those of most other states, were enacted during an agrarian era of modified feudalism dominated by landed gentry. They are heavily weighted in favor of the landlord against the tenant. Witness such statutory provisions that: (1) Permit landlords to institute forcible detainer proceedings upon oral complaint and without

bond, but require tenants to give bond with security in order to prosecute an appeal; (2) permit constructive service of process in the proceeding by posting same on the premises with the result that tenants do not receive actual notice in innumerable instances; (3) establish unreasonably short periods of notice to tenants of the proceeding (sometimes only three or four days) with the result that tenants do not have adequate time to procure counsel or otherwise prepare for trial; (4) enable inferior courts (most of which are not presided over by judges or magistrates with legal training) to summarily enter findings and judgments against tenants for failure to appear, without the introduction of any evidence by landlords; (5) enable such inferior court judges and magistrates to disallow valid defenses excusing non-payment or rent, including failure of landlords to comply with the terms of leases, failure to make necessary repairs, and failure to maintain the premises in a condition fit for human habitation; (6) permit eviction of tenants by setting-out on the street their household furniture, equipment, clothing, effects and other property without landlords furnishing bond or providing for the warehousing or storage of such items.

Such anachronisms prevent low-income tenants from litigating on a parity with landlords, and are incompatible with modern concepts of Fourteenth Amendment guarantees of equal protection of the law.

(4) The Questions Presented Demand Judicial Solution.

Despite the increase in legislative representation of metropolitan areas resulting from the "one man-one vote" rule, most state legislatures remain dominated by rural members. Virtually all of them are dominated by property-owing members. Pragmatic realities of representative government indicate that state legislatures will not update forcible detainer statutes except to the extent required by judicial decree to comply with constitutional mandates. Fundamental constitutional questions are matters for courts rather than legislatures.

Forcible detainer statutes of most states, including Oregon and Kentucky, are relics of a past era and do not conform to the conditions of our contemporary urban society. These statutes affect the lives of increasing millions of citizens who rent houses and apartments in all types of housing developments and complexes. Individual landlords have been and are being supplanted to a considerable extent by corporations, and by state, federal and municipal governments acting through housing authorities. There exists a great and urgent need for judicial pronouncement of essential constitutional requirements for forcible detainer proceedings.

The *Sniadach* and *Goldberg* cases, *supra*, are dispositive of essential constitutional requirements for judicial and administrative proceedings, but it appears that federal courts may have to apply them to the specifics of a variety of judicial and administrative proceedings before state legislatures and administrative

agencies will take appropriate corrective actions. The Oregon forcible detainer statutes, which are involved in the present case, appear to be typical of forcible detainer statutes of many other states. A definitive decision by this Court with respect to the Oregon statutes would be an effective means of obtaining modernization of similar statutes in a number of other states, incuding Kentucky.

CONCLUSION

For the reasons set out above, the Legal Aid Society of Louisville, presents this brief as *amicus curiae,* with the belief that the opinion and judgment herein of the three-Judge District Court of Oregon should be reversed.

Respectfully submitted,

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July 1, 1971

The undersigned certifies that on the 8th day of July 1971, this Motion and Brief was served upon the parties by mailing copies thereof, postage prepaid, to: John H. Clough, Esq., 402 Senator Bldg., 732 S. W. 3rd Ave., Portland, Ore., 97204, Counsel for Appellants; Theodore Jenson, Esq., 623 S. W. Oak, Portland, Ore., 97204, Counsel for Appellee, Dorothy N. Normet; Judge William C. Beers, Multnomah County Court House, Portland, Ore., 97204, Appellee.

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